

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1210

To be argued by
HENRY H. KORN

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1210

UNITED STATES OF AMERICA,

Appellee,

—v.—

TERRENCE R. IRVING,

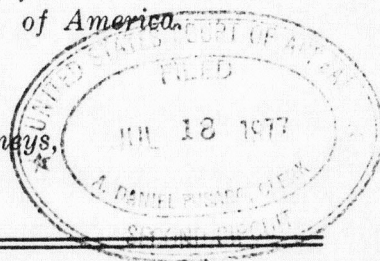
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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AFFIDAVIT OF MAILING

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being duly sworn
deposes and says that he (~~she~~) is employed in the office of the
United States Attorney for the Southern District of New York.

Stating also that on the 18th day of July, 1977
he (~~she~~) served a copy of the within Appellee's Brief
by placing the same in a properly postpaid franked envelope
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BARLOW, KATZ, & BARLOW
233 BROADWAY
NEW YORK 10007

And deponent further says that he (~~she~~) sealed the said envelope
and placed the same in the mailbox for mailing at the United
States Attorney's Office, Southern District of New York, One
St. Andrew's Plaza, New York, N.Y. 10007, in the Borough of
Manhattan, City of New York.

Henry H. Korn

Sworn to me before this

18 day of July, 1977

Phyllis A. Rush

PHYLLIS A. RUSH
Notary Public, State of New York
No. 03 4635198
Qualified in Bronx County
Commission Expires March 30, 1978

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
A. The Government's	2
1. Terrence R. Irving's Position as a Postal Employee	2
2. The Van Tassel Check	3
3. Handwriting, Fingerprint and Palm Print Expert Testimony	5
B. The Defense Case	6
C. The Government's Rebuttal Case	7
D. Pretrial Motion to Dismiss the Indictment	8
ARGUMENT:	
POINT I—The Trial Judge Did Not Err In Ruling That the Government May Refuse To Accept A Waiver By Defense Counsel Of the Defendant's Right To Be Prosecuted By Indictment ...	10
POINT II—The Trial Judge Correctly Held That the Superseding Indictment Was Timely Filed	13
POINT III—The Trial Judge Correctly Permitted the Government's Handwriting Analyst To Testify That It Was "Possible" Irving Wrote the Endorsement Of the Payee On the Van Tassel Check	16
CONCLUSION	18

TABLE OF CASES

	PAGE
<i>Couch v. United States</i> , 409 U.S. 322 (1973)	11
<i>Gillmore v. State of Utah</i> , 45 U.S.L.W. 4053 (Dec. 1976)	13
<i>Hale v. Henkel</i> , 201 U.S. 43 (1906)	11
<i>In re Horowitz</i> , 482 F.2d 72 (2d Cir.), <i>cert. denied</i> , 414 U.S. 867 (1973)	11
<i>Martin v. United States</i> , 284 F.2d 217 (D.C. Cir. 1960)	17
<i>McAlister v. Henkel</i> , 201 U.S. 90 (1906)	11
<i>Rattley v. Irelan</i> , 197 F.2d 585 (D.C. Cir. 1952) . . .	11
<i>Rogers v. United States</i> , 340 U.S. 367 (1951)	11
<i>Rollerson v. United States</i> , 343 F.2d 269 (D.C. Cir. 1964)	17
<i>United States v. Bermudez</i> , 526 F.2d 89 (2d Cir. 1975)	17
<i>United States v. Blitz</i> , 533 F.2d 1329 (2d Cir. 1976) .	12
<i>United States v. Bonacorsa</i> , 528 F.2d 1218 (2d Cir. 1976)	11
<i>United States v. Bright</i> , 517 F.2d 584 (2d Cir. 1975) .	17
<i>United States v. Calandra</i> , 414 U.S. 338 (1974) . . .	12
<i>United States v. Cumberbatch</i> , 76 Cr. 1076 (December 16, 1976)	14
<i>United States v. Galvin</i> , 394 F.2d 228 (3d Cir. 1968) .	17
<i>United States v. Hinton</i> , 543 F.2d 1002 (2d Cir. 1976), <i>cert. denied</i> , — U.S. — (1977)	12
<i>United States v. James</i> , 493 F.2d 323 (2d Cir.), <i>cert. denied</i> , 419 U.S. 849 (1974)	12

	PAGE
<i>United States v. White</i> , 322 U.S. 694 (1944)	11
<i>United States v. Willis</i> , 145 F. Supp. 365 (M.D. Ga. 1955)	11
<i>United States v. Wilson</i> , 441 F.2d 655 (2d Cir. 1971) ..	16
<i>United States v. Wolfson</i> , 405 F.2d 779 (2d Cir. 1968), <i>cert. denied</i> , 394 U.S. 946 (1969)	17

STATUTES AND RULES

18 U.S.C. § 495	2
18 U.S.C. § 1709	1
18 U.S.C. § 3161 <i>et seq.</i>	14
Federal Rules of Criminal Procedure, Rule 7(b) ..	10
Federal Rules of Evidence, Rule 402	17
Federal Rules of Evidence, Rule 702	16

OTHER AUTHORITIES

Southern District Plan for Prompt Disposition of Criminal Cases, Rule 3	13
Southern District Plan for Prompt Disposition of Criminal Cases, Rule 5(d)(2)	13, 14
Southern District Plan for Prompt Disposition of Criminal Cases, Rule 5(d)(5)	13
Southern District Plan for Prompt Disposition of Criminal Cases, Rule 11(e)	15
1974 U.S. Code Cong. & Admin. News, p. 7423	14
Falknor, <i>Extrinsic Policies Affecting Admissibility</i> , 10 Rutgers L. Rec. 574 (1966)	17



**United States Court of Appeals
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Docket No. 77-1210

UNITED STATES OF AMERICA,

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—v.—

TERRENCE R. IRVING,

Defendant-Appellee.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Terrence R. Irving appeals from a judgment of conviction entered on April 7, 1977, in the United States District Court for the Southern District of New York, after a two and one-half day trial before the Honorable Charles E. Stewart, Jr., United States District Judge, and a jury.

Indictment 76 Cr. 1132, filed on December 21, 1976, charged Irving in one count with having embezzled United States Treasury Check No. 90,386,496, addressed to Charles Van Tassel, P.O. Box 664, Poughkeepsie, New York, dated February 1, 1976, in the amount of \$329 (the "Van Tassel check"), in violation of 18 U.S.C. § 1709. A superseding indictment was filed on January 13, 1977, containing the same embezzlement count and adding, in Count Two, a charge that Irving cashed the

Van Tassel check, knowing the signature of Van Tassel was forged, in violation of 18 U.S.C. § 495.*

Trial began on February 22, 1977, and ended on February 24, 1977, when the jury found Irving guilty on both counts.

On April 7, 1977, Judge Stewart suspended the imposition of sentence and placed Irving on probation for two years on each count to run concurrently. Judge Stewart also imposed as a special condition of probation that Irving make restitution of the amount of the Van Tassel check, \$329.

Statement of Facts

A. The Government's Case

1. Terrence R. Irving's Position as a Postal Employee

In 1976, Terrence R. Irving was employed as a clerk in Poughkeepsie, New York, post office. She began working for the post office in October 1963. (Tr. 34, 130).** In 1976, Irving's job included working as a stamp and money order clerk. (Tr. 131). As a window clerk, Irving conducted her business in the large work area of the Poughkeepsie post office.. The window section

* The superseding indictment filed on January 13, 1977, inadvertently failed to include, in Count Two, the year of the offense, 1976. For this reason, the Government obtained a second superseding indictment which added the year 1976. That indictment was filed on January 20, 1977. In all other respects, the two superseding indictments are identical.

** "App." refers to the Joint Appendix; "Tr." refers to those pages of the trial transcript not referred to in the Joint Appendix; "GX" refers to Government Exhibits; and "Br." refers to defendant's brief.

where she worked was directly next to the post office boxes. (Tr. 33). Before mail was placed in the boxes, it was left out in the open on metal racks behind the boxes. The mail was, therefore, readily accessible to any postal employee in the work area. (Tr. 38).

2. The Van Tassel Check

The proof at trial established that on January 28, 1977, the Van Tassel check was mailed from the Department of the Treasury, Austin, Texas, to Mr. Van Tassel, P.O. Box 664, Poughkeepsie, New York. (Tr. 32).

This check was one of the regular monthly veterans disability checks that Mr. Van Tassel had been receiving on the first day of each month since he incurred total disability in 1948. (Tr. 20-21). Mr. Van Tassel's sole means of support for himself and family were these monthly disability checks. (Tr. 20). Because his disability rendered Mr. Van Tassel virtually immobile, he had his son, Charles Van Tassel, Jr., pick-up his mail and monthly disability check at the post office. (Tr. 20, 21, 26, 31). Mr. Van Tassel testified that he was the only one who would endorse his monthly checks; he never gave permission to anyone, including his son, to sign his checks. (Tr. 22).

Mr. Van Tassel did not receive his disability check for February 1976. That was the only time he could remember since 1948 when he did not receive his disability check. (Tr. 24). Mr. Van Tassel reported the non-receipt of the February check to the Veteran's Administration. (Tr. 26).

In June 1976, the Department of the Treasury wrote the Dutchess Bank & Trust Company, Poughkeepsie, New York, advised the Bank that the Van Tassel check had been reported forged, and requested that the Bank refund

the value of the Van Tassel check. (Tr. 48-49). Accompanying the letter to the Bank, the Department of the Treasury sent a copy of the Van Tassel Check. (Tr. 48-49). On the back of the copy of the check which the Bank received were the endorsements "Charles Vantassel" and "T. R. Irving".

Upon receipt of the copy of the check, Thomas J. Walsh, Assistant Vice President of the Bank, whose responsibilities included handling refunds on checks (Tr. 49), examined it and from the face of the copy the check determined that it had been cashed at the Bank by a teller, Cheryl Linsky, on February 6, 1976. (Tr. 48). Walsh asked Linsky if she knew who cashed the check (Tr. 49), and Linsky told Walsh that a customer of the Bank had endorsed the check and she had cashed it for the customer on February 6, 1976. (Tr. 50). Linsky could not remember the customer who had cashed the check on February 6; however, when she cashed the check she was familiar with the signature of the customer, because she had seen the signature in connection with several transactions before February 6. (Tr. 109, 112). Linsky also recalled that the Van Tassel check was cashed at the Bank between approximately noon and 12:20 P.M. on February 6. (Tr. 112).

After he talked with Linsky, Walsh went to the Bank's bookkeeper and examined Irving's account. He found that there were insufficient funds in her account to cover the Bank's charging her account with the value of the Van Tassel check, which would be normal Bank procedure in such a case. (Tr. 50). Walsh then called Irving at the post office and told her that a check which she had cashed at the Bank had been returned, as being forged, and the Bank requested her to refund the value of the check. (Tr. 51). When Irving told Walsh that she did not cash any check, Walsh asked her to come to the Bank to square her account. (Tr. 51).

A day or two after they talked by phone, Irving met with Walsh at the Bank, during her lunch hour, and Walsh showed her a copy of the check and the affidavit of forgery which the Bank had received. Irving told Walsh that she did not cash the check and that she did not write the second endorsement, "T.R. Irving". (Tr. 51).

3. Handwriting, Fingerprint and Palm Print Expert Testimony

The Government offered proof in the form of the opinion of Frankie E. Franck, a document analyst employed by the United States Postal Service Crime Laboratory, that Irving positively wrote the second endorsement "T.R. Irving", on the Van Tassel check. (Tr. 65). Franck testified that Mr. Van Tassel did not write the endorsement "Charles Van Tassel" on the check (Tr. 66), and Franck also explained in detail that after comparing Irving's handwriting samples with the payee's endorsement, Irving possibly wrote the payee's endorsement on the check. (Tr. 66-68). Franck found no evidence that either endorsement on the check was traced. (Tr. 81).

The Government also called Billy R. Dotson, a fingerprint specialist with the Postal Service Crime Laboratory, who compared Irving's known fingerprints with latent fingerprints found on the Van Tassel check and concluded that six latent fingerprints on the check were identical to Irving's known fingerprints. (Tr. 89). Dotson also examined Irving's known palm print with several latent palm prints found on the check and testified that after comparison he found the latent palm prints on the check to be Irving's. (Tr. 125-26). Finally, Dotson offered his opinion that from the position of the latent palm prints on the check, he believed they could possibly have been placed there at the time that the check was being endorsed. (Tr. 126-27).

B. The Defense Case

Irving testified and exhibited a remarkably selective memory. She testified in detail about the circumstances of her first learning about the existence of the Van Tassel check. She claimed that a secretary told her that a Mr. Walsh from the Bank called and she called him back. (Tr. 131-32). That same day, during her lunch hour, she went to see Walsh at the Bank. She recalled being shown the check, being asked by Walsh if she had signed it, and telling Walsh she did not sign the check. (Tr. 123). She agreed to sign an affidavit, at Walsh's suggestion, and Walsh said he would contact her when the affidavit was available for her to sign. (Tr. 132).

Irving recalled that Walsh called her sometime later and asked her to come to the Bank. That same day, Postal Inspector Donald Scott Kenerson called her to his office. (Tr. 132).

In considerable detail, Irving related what happened at her meeting with Kenerson and several other inspectors. Kenerson told her he wanted to talk to her regarding the check. He first gave her a statement containing her constitutional rights, which she read and then told Kenerson she understood. (Tr. 133). Irving stated that Kenerson then showed her the check, and she looked at it. (Tr. 133). Irving told Kenerson about her conversation with Walsh and she told Kenerson she planned on seeing Walsh that day. However, she was unable to see Walsh, because when the interview ended the Bank had closed. (Tr. 133).

Irving recalled that one of the inspectors suggested that she talk to an attorney and not go back to work until the attorney had spoken to the inspectors. (Tr. 133). Irving called her attorney and her attorney told her not to see Walsh again and not to sign any affidavit. (Tr. 134).

The next day Irving was called back to the inspectors' offices and thereafter she returned to work. (Tr. 134).

After the June interviews, the next time she met with the inspectors was on November 3, 1976. On this occasion, Kenerson was joined by Postal Inspector Donald Howd. (Tr. 134). Kenerson asked her to read the statement of her rights, which she did; he asked her if she had an attorney and allowed her to call her attorney. She was then arrested. (Tr. 135).

Irving denied signing the payee endorsement and the second endorsement, "T.R. Irving," on the check. (Tr. 135). Irving, however, claimed an inability to recall if Walsh and the postal inspectors showed her the original or a copy of the check (Tr. 135, 145) and she could not recall if she ever touched the original check. (Tr. 144).

The defense then called two character witnesses, one of whom represented Irving in her grievance proceeding against the Postal Service (Tr. 173); the other was one of Irving's co-workers in the post office. (Tr. 175). The latter witness testified that he was familiar with the standard delivery dates for mail between Austin, Texas and Poughkeepsie, New York. He stated it could take three days or less for a letter to arrive from Austin, Texas. (Tr. 177, 179). Finally, the defense called a friend who also had an account at the Bank. She testified that she had cashed second-party checks, such as the Van Tassel check, and Bank tellers required that she put her account number on the back of the check when she signed it. (Tr. 18).

C. The Government's Rebuttal Case

In rebuttal, the Government called Inspectors Kenerson and Howd. Kenerson testified that the first time he saw the original Van Tassel check was during the first

week of August 1976. (Tr. 184). During his interview of Irving in June 1976, he only showed her a copy of the Van Tassel check. (Tr. 185). When he saw Irving on November 3, 1976, he did not believe she showed her the original check, but if he had, he testified such evidence would have been kept in a plastic envelope to protect it for trial. (Tr. 187). The Government next called Inspector Howd who testified that the first time he saw the original check was when he saw Irving on November 3, 1976, and that the check was retained in a plastic envelope and was not removed from the envelope when it was shown to her on that day. (Tr. 189).

D. Pretrial Motion to Dismiss The Indictment

On December 13, 1976, Irving was subpoenaed to testify before the December Regular Grand Jury to hear testimony concerning an allegation that she violated 18 U.S.C. § 1709. (App. 26). On the date of her appearance, December 20, 1976, her attorney moved to quash or adjourn the return date of the subpoena, claiming that it was improper for the prosecution to subpoena Irving to the grand jury after she had advised the prosecution, through her attorney, that she would waive her right to be prosecuted by an indictment. (App 8). Irving's motion was heard by Judge Robert Carter, who was presiding in Part I on December 20, 1976, and he denied her motion. (App. 29).

Irving appeared before the grand jury on December 20, 1976, and although she initially refused to be sworn by the forelady of the grand jury (App. 35), the Government advised her that she was a target of the grand jury investigation and advised her of the rights she had as a target of the investigation. (App. 29, 36). After each question was asked by the prosecutor, Irving requested to consult with her attorney, who was present outside in the waiting room. She was excused from the

grand jury room each time she requested to consult with her attorney. (App. 27, 29). Each time, after returning, Irving asserted her Fifth Amendment privilege against self-incrimination. (App. 27).

The Government also called Inspector Howd, the case agent, to the grand jury on the same day. He related the material facts of the case to the grand jury. (App. 27, 46-52, 61-62). After Howd completed his testimony, the Government advised the grand jury that it was to draw no inference whatsoever from Irving's assertion of her Fifth Amendment privilege in voting an indictment. (App. 29, 62). The Government also advised the grand jury that if it requested the testimony of persons possessing first-hand knowledge of some of the facts in the case, the Government would make such witnesses available before it deliberated on an indictment. (App. 51). The grand jury voted a true bill on December 20, 1976. The indictment was filed on December 21, 1976.

A pre-trial conference in the case was held on January 10, 1977. At that conference, the defense told Judge Stewart that it would move to dismiss the indictment on the grounds that Irving's constitutional rights were in some fashion compromised by the Government's subpoenaing Irving to testify before the grand jury, where she asserted her Fifth Amendment privilege, and then asking the same grand jury to vote an indictment against Irving. (App. 14, 29).

As the Government explained to the defense counsel in a letter dated January 20, 1977, the Government obtained a superseding indictment before a new grand jury to avoid the issue raised by the defense. The only evidence before the new grand jury was Inspector Howd's testimony on December 20, 1976, which was read to the new grand jury. (App. 30, 65-77). As Judge Stewart observed, the Government did not concede that the December 20 indictment was tainted. (App. 14, 29).

In her motion papers, Irving, in addition to claiming the initial indictment was tainted and should be dismissed, argued that the superseding indictment was not filed within 60 days of the date of Irving's arrest and violated Rule 3 of the Southern District Plan for Prompt Disposition of Criminal Cases. Judge Stewart rejected both defense arguments in a memorandum decision dated February 18, 1977. (App. 28-33).*

ARGUMENT

POINT I

The Trial Judge Did Not Err In Ruling That the Government May Refuse To Accept A Waiver By Defense Counsel Of the Defendant's Right To Be Prosecuted By Indictment.

Irving argues it was improper for the Government to subpoena her before the grand jury to testify, when she was the target of the grand jury's investigation. She urges that through her counsel she waived her right to be prosecuted by indictment and contends that the Government's insistence on its "right" to have her appear in the grand jury violated her constitutional rights. As a result, Irving contends the indictment was tainted and it was error for the trial judge not to dismiss it.

The trial judge was correct in ruling that Irving's claim that the indictment should be dismissed due to "taint" was meritless. Rule 7(b) of the Federal Rules of

* At trial, Judge Stewart requested the Government to make available for the Court's inspection the minutes of the grand jury proceedings on December 20, 1976 and January 12, 1977. (Tr. 163-64). After reviewing the transcripts, Judge Stewart concluded that there was nothing in them which would cause the Court to change its prior ruling. (Tr. 254).

Criminal Procedure provides that an offense "may be prosecuted by information" if the defendant has waived his right to be prosecuted by indictment. The United States Attorney has the discretion to proceed by indictment, even though a defendant has waived indictment and would prefer that the case be handled on information. *Rattley v. Irelan*, 197 F.2d 585 (D.C. Cir. 1952).*

In this case, Irving did not personally waive her right to be prosecuted by indictment. Particularly under that circumstance, there was no prohibition against the Government's calling her to the grand jury to personally assert any Fifth Amendment privilege, despite statements by her counsel that she would assert the Fifth Amendment privilege in the grand jury. The privilege against self-incrimination may not be asserted by counsel on behalf of his client; it is for the client, himself, to assert. *Rogers v. United States*, 340 U.S. 367, 371 (1951); *United States v. White*, 322 U.S. 694, 699, 704 (1944); *McAlister v. Henkel*, 201 U.S. 90 (1906).** See also *Couch v. United States*, 409 U.S. 322 (1973); *In re Horowitz*, 482 F.2d 72, 82 (2d Cir.), *cert. denied*, 414 U.S. 867 (1973). Only the client can make the final judgment about whether the answers will tend to incriminate him. An attorney can never be certain that he has been fully advised of the pertinent facts by his client. *United States v. Willis*, 145 F. Supp. 365, 368 (M.D. Ga. 1955).

In addition, this Court has explicitly held that the Government is not precluded from subpoenaing as a grand jury witness one who has become a target of its inquiry or a prospective defendant. *United States v. Bonacorsa*, 528 F.2d 1218, 1223 (2d Cir. 1976).

* Judge Carter understood that the Government is vested with discretion in determining whether to proceed by indictment despite the defendant's waiver of her right to have a grand jury consider the Government proof. (App. 8, 9).

** An agent may not assert the privilege against self-incrimination of his principal. *Hale v. Henkel*, 201 U.S. 43, 69-70 (1906).

Moreover, the fact that the defendant invoked the Fifth Amendment did not taint the initial indictment. Indeed, this case falls squarely within the proposition that "an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence." *United States v. Calandra*, 414 U.S. 338, 345 (1974); *United States v. James*, 493 F.2d 323, 326 (2d Cir.), *cert. denied*, 419 U.S. 849 (1974); *United States v. Blitz*, 533 F.2d 1329, 1344 (2d Cir. 1976). When called to testify before the grand jury, Irving was advised of her constitutional rights. Further, when, after each question she requested to consult with her attorney who was waiting outside the grand jury room, the Government promptly excused her to consult with her attorney. Finally, at the end of all the testimony—including that of the postal agent—the grand jury was advised by the prosecution that it was to draw no adverse inference whatsoever from the defendant's asserting her Fifth Amendment privilege before the grand jury.

Furthermore, even if the original indictment had been tainted by the Government's refusal to accept defense counsel's waiver of the defendant's right to be prosecuted by indictment, as Judge Stewart assumed for the purpose of his decision, the superseding indictment was presented to a different grand jury without Irving's testimony. (App. 29, Tr. 254). The superseding indictment could therefore, in no way have been tainted by Irving's assertion of her Fifth Amendment privilege before the grand jury which voted the original indictment. *United States v. Hinton*, 543 F.2d 1002, 1010 (2d Cir. 1976), *cert. denied*, — U.S. — (1977).

Irving erroneously relies upon several decisions to support her contention that an accused has an "absolute" right to waive indictment. In each of the cases which she has cited, the issue was whether a defendant may waive a constitutional right, not whether the Government

was bound to accept that waiver. For example, in *Gillmore v. State of Utah*, 45 U.S.L.W. 4053 (Dec. 1976), the issue before the Court was whether a defendant could waive his right to an appeal. The Court was not asked and did not address the issue of whether the Government was bound by the defendant's waiver of that right.

POINT II

The Trial Judge Correctly Held That the Superseding Indictment Was Timely Filed.

Irving was arrested on November 3, 1976, and the original indictment was filed on December 21, 1976. The superseding indictment was filed on January 13, 1977. Irving argues that the superseding indictment was not filed within 60 days of her arrest, and therefore must be dismissed.

Rule 3 of the Southern District Plan for the Prompt Disposition of Criminal Cases (the "Plan") provides that the Government must file an indictment within 60 days of a person's arrest. The original indictment was brought well within the 60-day time period. Irving argues that the same 60-day time period applies to the filing of superseding indictments, as well.

The trial Judge correctly held that under the Plan the superseding indictment was required to be filed within the 6-month period within which the defendant must be tried on the original indictment. The court relied on Rules 5(d)(2) and 5(d)(5) of the Plan. Rule 5(d)(5) states

"The time within which an indictment or information must be obtained on the subsequent charge, or within which an arraignment must be held on

such charge, shall be determined without regard to the existence of the original indictment or information".

Rule 5(d)(2) states that if the original indictment is pending at the time the superseding indictment is filed, the trial must commence within the time limit for commencement of trial on the original indictment. As Judge Palmieri observed in *United States v. Cumberbatch*, 76 Cr. 1076 (December 16, 1976) "[i]t is highly unlikely that the Plan envisioned a requirement that all subsequent indictments be filed within 60 days of a defendant's arraignment on the original indictment." (— F. Supp. —; Slip Op. at 11). The trial judge, therefore, held that the only requirement is that the superseding indictment be filed within the time limit for trial on the original indictment.*

Irving argues that in enacting the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, Congress intended that superseding indictments be filed within the 60-day time period within which the Government was required to file its original indictment against Irving. Irving points to language in the legislative history in which the House Committee on the Judiciary stated that it was its belief that "every effort should be made to indict individuals within the time limit provided." 1974 U.S. Code Cong. & Admin. News p. 7423. This statement was made in the context of extensions of time for the Government to file indictments in those districts where grand juries are not convened on a continuous basis, which is quite clearly not the case in the Southern District of New York. What is clear is that Congress directed that in those districts

* The issue of the applicability of the Plan to superseding indictments is presently pending before this Court in *United States v. Cumberbatch*, Dkt. No. 77-1070, argued June 9, 1977.

where grand juries are convened continuously, a defendant must be indicted within the 60-day time period following arrest. The excerpts of the Committee Reports which Irving relies on, and indeed a reading of the entire Report, indicates that Congress did not establish any guidelines for the filing of superseding indictments. The interpretation of the Speedy Trial Act and the Plan which Judge Stewart and Judge Palmieri made—namely, that the superseding indictment must be filed within the six-month period for trial on the original indictment—comports with Congress' intent as to when a criminal proceeding at the trial level must be concluded. Congress intended that as long as the Government brought the defendant to trial within the time period for trial on the original indictment, the Government could, if the evidence warranted doing so, file a superseding indictment against the defendant.

Finally, it should be noted that under Irving's reasoning, the Government is simply barred from filing a superseding indictment, for any reason, more than 60 days after arrest. This illogic not only finds no support in the Speedy Trial Act or in the Southern District Plan, but makes no sense at all in face of the requirement that trial must actually commence within 180 days of arraignment. Irving does not dispute that this latter provision was met; it is equally clear, that the filing of the superseding indictment did not delay the proceedings or prejudice Irving in any way.*

* This fact alone disposes of Irving's claim. In apparently seeking a dismissal of the superseding indictment, Irving ignores the fact that Rule 11 of the Plan—dealing with "Sanctions"—provides for dismissal only with respect to the failure of the Government to be ready for trial (and even then permits the dismissal to be without prejudice), and explicitly states that dismissal is not required for violation of the other time limits. Rule 11(e).

POINT III**The Trial Judge Correctly Permitted the Government's Handwriting Analyst To Testify That It Was "Possible" Irving Wrote the Endorsement Of the Payee On the Van Tassel Check.**

Irving argues that the trial judge committed reversible error in permitting the Government's handwriting expert to testify that it was "possible" Irving wrote the endorsement, Charles Van Tassel, on the Van Tassel check. Irving argues that because the opinion was nothing more than a statement of possibility, it should not have been admitted into evidence. This argument is meritless.

Rule 702 of the Federal Rules of Evidence provides:

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."

As this court has recognized "an expert need not have an absolute certitude about his opinion for it to be allowed into evidence." *United States v. Wilson*, 441 F.2d 655, 656 (2d Cir. 1971). In that case, a handwriting expert testified that it was his belief that the defendant had forged the payee's name on a United States Treasury check. The court held that the expert's lack of absolute certitude went to the weight and not to the admissibility of the evidence.

Opinion evidence, therefore, is not rendered inadmissible merely because it expresses a possibility. *United*

States v. Galvin, 394 F.2d 228 (3d Cir. 1968).^{*} Indeed, Irving's claim runs afoul of two established doctrines of the rules of evidence. First, of course, the admissibility and use of expert testimony is primarily left to the sound discretion of the trial judge, who has before him not only the expert but also the context in which the testimony will be heard; for this reason, a determination concerning the use of experts will not be reviewed except for abuse of discretion. *United States v. Bermudez*, 526 F.2d 89, 98 (2d Cir. 1975); *United States v. Bright*, 517 F.2d 584, 586 (2d Cir. 1975); *United States v. Wolfson*, 405 F.2d 779, 785 (2d Cir. 1968), *cert. denied*, 394 U.S. 946 (1969). Second, Rule 402 flatly states that "all relevant evidence is admissible," and further defines "relevant evidence" as evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable. . . ." (Emphasis added). As the Advisory Committee's Notes state, "It is not to be supposed that every witness can make a home run," quoting from Falknor, *Extrinsic*

^{*} Irving's reliance on *Rollerson v. United States*, 343 F.2d 269 (D.C. Cir. 1964), and *Martin v. United States*, 284 F.2d 217 (D.C. Cir. 1960), is misplaced. In *Rollerson*, the court stated that the testimony of an expert might be excluded if conclusory statements were unsupported by underlying facts. In this case, the handwriting expert specified in detail why he believed Irving possibly wrote the payee endorsement, Charles Van Tassel. (Tr. 67-68). Accordingly, his opinion was supported by underlying facts. In *Martin*, the court said it was proper for the trial judge to admit expert testimony "fraught with 'possibilities' and 'probabilities'", 284 F.2d at 220, because it was for the jury to decide, on the basis of the certainty or lack of certainty of their testimony, whether to believe the experts. In this case, Irving's counsel vigorously attacked the expert's opinion on cross-examination to discredit the expert (Tr. 76-79), and emphasized the weakness of his opinion in summation. (Tr. 212-14). The jury could therefore have concluded, if it wanted to, that Mr. Franck's testimony was not believable. By its verdict, the jury apparently chose to believe his testimony.

Policies Affecting Admissibility, 10 Rutgers L. Rec. 574, 576 (1966). The testimony in question certainly was of some help in establishing whether or not Irving endorsed the check, since the mere fact that sufficient indices of similarity to Irving's writing appeared in the check was circumstantial, although admitted not conclusive, proof that she wrote it. Particularly since the testimony, the limited nature of which Irving emphasized in summation, did not "have an undue tendency to suggest decision on an improper basis," Advisory Committee's Notes to Rule 403, there was simply no reason for its exclusion.

CONCLUSION

The judgment of conviction should be affirmed

Respectfully submitted,

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